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CLEARINGHOUSE RULE 98-101

Comments

[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated October 1994.]

2. Form, Style and Placement in Administrative Code

a. Under s. 227.15 (1), Stats., an agency may not hold a public hearing on a proposed rule until after it has received a written report of the review by the Legislative Council Staff or until after the initial review period of 20 working days under s. 227.15 (2) (intro.), Stats., whichever comes first. In this case, the Legislative Council Staff received the proposed rule on July 16, 1998, and the initial review period expires August 13, 1998. Thus, a public hearing may not be held until after August 13, 1998 unless the Legislative Council Staff issues its report before that date.

Because the Department of Employee Trust Funds (DETF) has scheduled a public hearing for August 12, 1998, the Legislative Council Staff is issuing its report before its initial review period expires in order to permit DETF to hold the hearing as scheduled. In the future, arrangements should be made in advance with the Director of the Legislative Council Staff Rules Clearinghouse if DETF intends to hold a hearing before the date on which the Legislative Council Staff's initial review period is scheduled to expire.

b. In the second bullet point of the analysis and in the second paragraph of the general summary, use of the slashed alternatives “he/she” and “his/her” should be eliminated, and sex neutral language should be substituted. [See s. 1.01 (3), Manual.]

c. In the text of the rule, s. ETF 50.48 (4) (b) should be eliminated because it is not affected by the proposed order. The only provision in the rule should be the creation of s. ETF 50.48 (4) (c). The text should begin with a numbered SECTION and treatment clause which

should read: “SECTION 1. ETF 50.48 (4) (c) is created to read:”. [See s. 1.04 (1), Manual. Also, the introductory and relating clauses and notice of hearings should be amended accordingly.] The text of s. ETF 50.48 (4) (c) should not be underscored because it is being created, not amended. [See s. 1.06 (1), Manual.]

d. In s. ETF 50.48 (4) (c), the reference to “subd. 1. or 3.” should be changed to “par. (b) 1. or 3.” [See s. 1.07 (2), Manual.]

e. In s. ETF 50.48 (4) (c), “Board” should not be capitalized. [See s. 1.01 (4), Manual.]

4. Adequacy of References to Related Statutes, Rules and Forms

The analysis should include a reference to any statute that the rule interprets and each statute that authorizes promulgation of the rule. [See s. 1.02 (2) (a), Manual.] The proposed order refers to s. 40.03 (6), Stats., as providing authority for the rule. It appears that s. 40.03 (2) (ig) and possibly s. 40.61 (1), Stats., should be cited as providing authority to promulgate the rule and that ss. 40.61 and 40.62, Stats., should be cited as statutes interpreted by the rule. The proposed order also should refer to approval of the Group Insurance Board. [See s. 40.03 (2) (ig), Stats.]

5. Clarity, Grammar, Punctuation and Use of Plain Language

a. In the second bullet point in the analysis, the word “denies” should be changed to “denying.”

b. The last paragraph of the analysis indicates that the rule will clarify:

. . . that the Department and Board may approve the LTDI benefit if the sole basis for denial was the employer’s negative certification and it finds that the employer was unreasonable and incorrect in submitting the negative certification.

The following comments apply to this provision:

- (1) The reference to the “Board” in the analysis is unclear. Presumably, this is the Group Insurance Board. This should be specifically stated.
- (2) Section ETF 50.48 (4) (c) indicates that it is the Board that makes a decision about approval of benefits. In contrast, the analysis indicates that it is DETF **and** the Board. This discrepancy should be reconciled.
- (3) The analysis indicates that DETF and the Board “may” approve the LTDI benefit under certain conditions. In contrast, s. ETF 50.48 (4) (c) indicates that the Board must approve the LTDI benefit under those conditions. This discrepancy should be reconciled.
- (4) The analysis refers to the sole basis for denial as being the employer’s negative certification. In contrast, s. ETF 50.48 (4) (c) refers to the

“employer’s negative certification *or* failure to certify” (emphasis added) as if these are two separate possibilities. If there are two separate possibilities, both should be referred to in the analysis, rather than only one. This comment also applies to what is now labeled the general summary. (Also see the comments in item g., below.)

- (5) The analysis indicates that the rule requires a finding that the employer was “unreasonable *and* incorrect” (emphasis added) before benefits are approved. In contrast, s. ETF 50.48 (4) (c) requires a finding that the employer’s action was “unreasonable *or* incorrect” (emphasis added). This discrepancy should be reconciled.

c. In the second sentence of the last paragraph of the general summary, the phrase “decision to shall” should be changed to “decision shall.”

d. Unlike in ch. ETF 41, ch. ETF 50 does not define the term “board.” Section ETF 50.48 (4) (a) refers to the “group insurance board.” In s. ETF 50.48 (4) (c), the reference to the “Board” should be changed to the “group insurance board” unless a definition of the term “board” is created to apply throughout ch. ETF 50 or s. ETF 50.48.

e. In s. ETF 50.48 (4) (c), the phrase “finding whether” should be changed to “finding as to whether.”

f. Section ETF 50.48 (4) (b) requires that DETF deny an application under certain circumstances, including the circumstances in s. ETF 50.48 (4) (b) 1. and 3. Section ETF 50.48 (4) (b) 1. refers to DETF’s receiving a statement from the employer certifying that employment has been terminated or the employee is on leave and not expected to return for a reason other than medical impairment. Section ETF 50.48 (4) (b) 3. refers to DETF’s receiving a certification from the employer denying that the claimant is totally and permanently disabled (with a slightly different test for those in protective occupations).

Section ETF 50.48 (4) (a) permits a claimant who wishes to contest DETF’s findings to appeal to the Group Insurance Board. Section ETF 50.48 (4) (c) apparently presumes, but does not state, that the claimant has made an appeal to the Group Insurance Board under s. ETF 50.48 (4) (a) to contest DETF’s findings. Is this the case? If so, this could be clarified by language in s. ETF 50.48 (4) (c) such as the following: “If the group insurance board receives an appeal under par. (a) and if the department’s denial is based solely on”

However, it appears that it is not DETF’s findings that are at issue because DETF is required to deny the application if DETF has received a certification which lists a nonmedical reason for termination or denies that the employee is totally and permanently disabled. Rather, the item that is at issue is the accuracy of the employer’s certification. Therefore, it may be more appropriate to specify the appeal rights with respect to this issue in s. ETF 50.48 (4) (c), for example, by stating at the beginning of s. ETF 50.48 (4) (c) that if DETF’s denial is based solely on par. (b) 1. or 3., or both, the claimant may appeal to the Group Insurance Board.

g. Section ETF 50.48 (4) (c) refers to the employer’s “negative certification or failure to certify.” However, under the cross-referenced provisions (that is, s. ETF 50.48 (4) (b) 1. and 3.),

the employer would have made a certification in either case (that is, either certification of nonmedical reasons for termination or certification denying total and permanent disability). Therefore, the phrase “failure to certify” is unclear. Was this intended to refer to situations under s. ETF 50.48 (3) (b) 8. when the employer certifies that it has no information on which to base an opinion regarding whether the employee is totally and permanently disabled? This should be clarified.

h. In order to avoid ambiguity, it would be preferable to begin the last sentence with the phrase: “If the group insurance board determines that the employer’s action was unreasonable or incorrect,”

i. In s. ETF 50.48 (4) (c), the phrase “an order to the employer to make the certification” is unclear. As noted above, the employer would have made a certification under either s. ETF 50.48 (4) (b) 1. or 3. as those are the only provisions that could lead to the use of s. ETF 50.48 (4) (c). If the intent is to require that the employer “amend” its certification, it would be clearer to state this rather than referring to requiring the employer to “make” a certification.